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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MASOUD SOORUSH ARAS, Defendant and Appellant.	2d Crim. No. B230930 (Super. Ct. No. 2010032011) (Ventura County)

Appellant is arrested for possession of illegal drugs by an officer who retrieves a drug-filled plastic bag from a park trash can. At the jury trial, the arresting officer testifies that during the booking process, appellant admitted having earlier touched the plastic bag. The prosecutor subsequently learns of the existence of a video recording of the booking process, and immediately makes disclosure to defense counsel. With equal alacrity the defense offers the two-minute booking video into evidence. The prosecutor objects. The trial court finds the statements on the video are not inconsistent with the officer's testimony and that the defense failed to furnish a transcript of the video, and excludes the video. The ruling denied appellant the ability to contest the context, tone and content of the statement.

Masoud Soorush Aras appeals from the judgment following his conviction by jury of possession for sale of methamphetamine and transportation of

methamphetamine. (Health & Saf. Code, §§ 11378; 11379, subd. (a).)[1] He admitted allegations that he had suffered a prior drug-related conviction (§ 11370.2, subd. (a)) and served a prior prison term (Pen. Code, § 667.5, subd. (b)). The trial court sentenced him to state prison for 10 years 8 months (a 3-year middle term for transportation of methamphetamine; a consecutive 8-month term for possession of methamphetamine for sale; 2 consecutive 3-year § 11370.2 enhancements; and a consecutive 1-year prior prison term enhancement).

Appellant contends that the court's refusal to admit the booking video constituted prejudicial error. Our review of the video discloses that appellant's statement was ambiguous and muffled, and that its content should properly have been decided by the jury. Indeed, it is unclear whether appellant's response to the officer's comments was declarative or interrogative. Because the purported statement was a cornerstone of the prosecution's case, was urged as an admission to the police officer, was inserted into a hypothetical asked of an expert concerning who possessed the drugs, and was hammered home to the jury as a factual concession, its importance cannot be overstated. Yet the very evidence that would have availed the jury the opportunity to see and to hear exactly what happened was barred from its view. We reverse.

BACKGROUND

Prosecution Evidence

On September 6, 2010, at about 2:15 p.m., while driving a marked patrol car, Ventura Police Department (VPD) Officer Cameron Goettsche saw appellant driving on Thompson Avenue in Ventura. Goettsche made a U-turn in an effort to catch him. Appellant parked on the east side of Chestnut Street, adjacent to a park. Goettsche parked about two lengths behind him. Appellant ran toward the park restroom, while fumbling with several items in his hands. He also seemed to be reaching into his front right pocket as he ran. Goettsche was about 50 yards

[1] All statutory references are to the Health and Safety Code unless otherwise stated.

behind him, called his name, told him to stop, and continued chasing him. He lost sight of appellant just once, for about five seconds, when appellant ran around the side of the restroom.

Goettsche found appellant inside the restroom, standing at the urinal, fumbling with a water bottle and car keys. He seemed flustered and agitated. Goettsche handcuffed and detained him. Appellant said that he "had to take a piss really bad." Goettsche escorted him to the patrol car, and said he could not use the restroom until his partner (Officer Karl Reyes) arrived. There were other people in the park, but Goettsche saw no one except appellant in or near the restroom.

Reyes arrived and stayed with appellant while Goettsche searched the path between appellant's car and the restroom. At some point, Reyes saw a man enter a truck that was parked in front of his patrol car and drive away.

Goettsche found a plastic bag that held five smaller baggies, at the top of a trash pile on an overflowing large green trash can. The can was just outside the men's restroom. The content of each small baggie appeared to be methamphetamine. Reyes searched appellant and found more than $1,500 in his pants pockets, in $1, $10, $ 20, $50, and $100 bills. Some bills were in a wallet in his right rear pocket; others were in his right front pocket. Appellant said he earned the money by doing construction work, and he was going to deposit it in the bank. Reyes found one cell phone inside appellant's pocket and two others in his car. Neither Goettsche nor Reyes found any pay/owe sheets in appellant's car or pockets.

While waiting with appellant, Reyes heard the cell phone in appellant's pocket ring as many as 10 times within 20 minutes. Appellant acted nervous and fidgety, and his legs were shaking. He kept grabbing his pockets and looking toward the restroom area.

Goettsche took appellant to the police station. Appellant had not used the park restroom and declined to use the station restroom. Goettsche advised him of his rights and interviewed him. Appellant said he was on his way to buy propane at a nearby gas station and stopped at the park because he had an urgent need to use

the restroom. He denied having heard Goettsche shouting and telling him to stop as he ran toward the park restroom. He repeatedly denied that the recovered drugs were his, and suggested they might belong to the homeless people in the park.

Goettsche falsely told appellant that his fingerprints were on the recovered baggies. He persisted and repeatedly asked appellant whether he had touched the baggies. Appellant persisted in his denials. Goettsche also told appellant that it was common for fingerprints to be on baggies and it would be possible that appellant's "fingerprints would be on them from moving them inside in his car." According to Goettsche, appellant agreed. Goettsche "pretty much shrugged it off, like it was not that big a deal and kind of agreed with [appellant] and just said okay." During cross-examination, Goettsche admitted that he told appellant "it was common that there would be fingerprints on the baggies and if [appellant] had touched the baggies in his car moving them around that it was no big deal . . . ."

The five small baggies weighed .8, 1.8, 1.9, 3.8, and 3.9 grams, and each contained methamphetamine. The large, external bag that held the smaller baggies appeared to have been scrunched or balled up, as if it had been in someone's pocket.

VPD Officer Teddy Symonds testified as an expert in narcotics use, packaging, transportation and sales. In response to a hypothetical question based on the facts of this case, he opined that the methamphetamine in the baggies would have been possessed for purposes of sale. He cited multiple factors that led to his opinion. (E.g., sellers typically carry multiple baggies whereas a user would more likely have one; the baggies contained methamphetamine in amounts typically packaged for sale; the denominations, location, and amount of cash described were consistent with drug sales; "[a]nd then you have a subject who later, upon being questioned, states that he touched the bag . . . .") During cross-examination, Symonds testified that his opinion would be more "unstable" if the hypothetical

deleted the suspect's admission, but that it would not change his opinion, under the totality of the circumstances.

Defense Evidence

Appellant's half-brother, Sam Farr, testified that appellant worked off and on for his construction company. Farr had given appellant some of the money that he possessed upon his arrest, to pay for tickets, and to use on his vacation.

DISCUSSION

The Booking Video

Appellant contends that the trial court committed reversible error by excluding the booking video on the grounds that it lacked a prior inconsistent statement and appellant failed to submit a transcript of the video. We agree.

Relevant Proceedings

Goettsche took the stand on December 8, 2010. Defense counsel started his cross-examination of Goettsche that afternoon. The next morning, before Goettsche resumed his testimony, the prosecution advised the court that it had just learned about a video of appellant's booking, and provided a copy to defense counsel. He initially had technical difficulties viewing the video, and resumed his cross-examination of Goettsche. The court excused Goettsche before the noon recess. Counsel viewed the video during the noon recess. At the beginning of the afternoon session, defense counsel advised the trial court that the video appeared to differ from Goettsche's testimony, with respect to appellant's comments about touching the baggies. The court gave counsel additional time to view the video to decide whether he wished to introduce it.

The trial court and defense counsel each reviewed the booking video before trial resumed on December 10, 2010. Counsel argued that the video was admissible to impeach Goettsche's testimony, so that the jury could determine from the context and tone of appellant's statements whether they were admissions. Counsel could not provide the transcript during trial. The court ruled that the video was not admissible, because it did not contain a prior inconsistent statement and

there was not a transcript, as required by the California Rules of Court, rule 2.1040 (a)(1).[2]

The booking video is less than three minutes long, with the statement in question taking less than 20 seconds. It depicts appellant in custody at the jail. Goettsche repeatedly told appellant his fingerprints were found on the baggies; appellant denied this. The exchange continued with a back and forth over the appellant's prints purportedly being on the bag. It is difficult to decipher all of appellant's responses. When Goettsche asked why his prints would be on the bag if he never touched it, appellant said something about using prints from elsewhere and moving them to the bag. Goettsche made statements like the following: "Fingerprints all it means is that you touched it; it might be in your car and you touched it, right?" According to Goettsche, appellant responded affirmatively. Goettsche told appellant, "Your touching it in the car doesn't mean a whole lot. Everyone touches it in the car. [If] you touched it in the car doesn't mean a whole lot . . . it might be in your car and you touched it right?" He also asked appellant if his DNA was "gonna be on it," and said "that's a lot more than fingerprints."

Appellant asserts that he offered the booking video to show that Goettsche's testimony was inaccurate in that appellant made the statement regarding his fingerprints because he was either: "(1) merely agreeing with the officer that if he had touched the bags, his fingerprints or DNA would be on them; or (2) sarcastically responding to the officer's repetitive and baiting interrogation." He asserts that the jury should have been able to determine from his tone and context of

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[2] Rule 2.1040 (a) provides in relevant part as follows: "(1) Before a party may present or offer into evidence an electronic sound or sound-and-video recording of deposition or other prior testimony, the party must lodge a transcript of the deposition or prior testimony with the court. [¶] . . . [¶] (3) If the court reporter takes down the content of all portions of the recording in (1) that were presented or offered into evidence, the party offering or presenting the recording is not required to provide a transcript of that recording . . . ."

All references to rules are to the California Rules of Court.

his statements whether he admitted that he touched the baggies as Goettsche testified.

Listening to the video, it is clear that, as Goettsche testified, appellant repeatedly denied that the baggies or drugs were his. The clarity of the purported admission is not so clear. Of greater importance, however, is its tone: Did he admit he touched the baggies, or was he questioning that he said that? Was the reply responsive or sarcastic? Appellant offered the video to aid the trier of fact in doing precisely what it is called upon to do: decide what happened. The only objective evidence of that pivotal fact, however, was not heard by the jury.

The trial court sustained the prosecution objection to the booking video because (1) appellant did not comply with rule 2.1040 (a) by failing to timely provide a transcript of what was said; and (2) the video did not contain an inconsistent statement. Neither reason justified the court's ruling. Because the video had only been received the day before it was offered, it is understandable that the transcript was not timely. More importantly, the transcript would have been misleading because the key issue involved what was said, and how it was said, including the tone and context. Furthermore, rule 2.1040 (a)(3) contains a procedure for admitting video evidence without a transcript, by having the court reporter transcribe the audible text. If that were not possible, the court could have ordered the prosecution to provide assistance in producing a transcript.

The absence of an inconsistent statement did not render the booking video inadmissible. It was admissible to impeach Goettsche to try to show "[t]he existence or nonexistence of any fact testified to by [a witness]" (Evid. Code, §780, subd. (i).) It was also admissible, pursuant to Evidence Code section 356, which states: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may

also be given in evidence." Considering the delayed disclosure of the video, its brevity, its purpose, and its unquestioned authenticity, the trial court abused its discretion by excluding it. We will address the question of prejudice after considering a related contention.

Expert Testimony

Appellant contends that the trial court erred by allowing expert witness Symonds to testify that appellant possessed methamphetamine. We agree.

Expert testimony is admissible when the subject matter of the testimony is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. (Evid. Code, § 801, subd. (a); *People v. Gardeley* (1996) 14 Cal. 4th 605, 617.) "We apply an abuse of discretion standard in reviewing a trial court's decision to admit the testimony of an expert. [Citation.]" (*People v. Prince* (2007) 40 Cal.4th 1179, 1222.) In cases involving the possession of illegal narcotics, experienced officers may give their opinion that the narcotics were held for purposes of sale. (*People v. Doss* (1992) 4 Cal.App.4th 1585, 1596.) They may not, however, provide testimony regarding matters that add "nothing to what must be apparent to the jury's common sense." (*People v. Hernandez* (1977) 70 Cal.App.3d 271, 281.)

The trial court instructed the jury on the elements of the possession offenses charged, including as to each offense, that the prosecution must prove the defendant "possessed" the contraband and "knew of its presence." (CALCRIM Nos. 2300, 2302, 2304.) Resolution of those issues was not beyond the common knowledge of jurors and thus not appropriate matters for expert testimony. (Evid. Code, § 801, subd. (a); *People v. Hernandez, supra,* 70 Cal.App.3d at p. 281.)

The trial court erred by allowing the prosecutor to pose a hypothetical to Symonds which included an improper assumed fact. Although the proper focus of his opinion was the purpose for which "the man" possessed the methamphetamine, assuming he possessed it, the court allowed the prosecutor to ask Symonds to assume "the man admits touching the baggies." Defense counsel

objected, because, as phrased, the hypothetical called on Symonds to determine the separate factual question of whether appellant possessed them, a matter within the jurors' common sense. Counsel further asserted that after hearing the video, he did not think that appellant said "what the cop thinks . . . ." The court overruled the objection and Symonds was permitted to answer the question based on the assumption that "the man" admitted touching the baggies.

The court's ruling allowing Symonds to assume that "the man" admitted "touching the baggies" exacerbated the damage caused by the court's ruling excluding the video. For example, Symonds's testimony reinforced the idea that appellant made the statement, when he testified, "And then you have a subject who later, upon being questioned states that he touched the bag . . . ." After describing other factors (cash location, methamphetamine packaging, etc.), Symonds's conclusion stressed appellant's purported admission again: "All that together adds up to – and really, based on the statement, being that the concrete portion of the totality of him saying that he touched it and his fingerprints may be on it shows me that the defendant is in possession for sales of methamphetamine." On cross-examination, Symonds conceded that his opinion would become "a little more unstable," if the hypothetical deleted the fact that the man said, "I touched the bag," although it would not change.

Prejudice

Appellant argues that the trial court's erroneous exclusion of the video deprived him of his federal constitutional right to cross-examination, and the error requires reversal unless it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) We conclude that the alleged error in excluding the video was prejudicial under any standard of review. (*Ibid.; People v. Watson* (1956) 46 Cal.2d 818, 836.) "'There is a reasonable probability of a more favorable result within the meaning of *Watson* when there exists "at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to

whether the error affected the result.'" [Citations]" (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1432.)

The trial court's ruling prevented the defense from using the video to challenge Goettsche's testimony, and foreclosed all inquiry into the legitimate field of favorable inferences deducible from defendant's statements. "The net effect was to hobble defendant's ability to challenge a crucial prosecution witness and to present independent, objective, and admissible evidence" of what appellant said and did in context. (See *People v. Filson* (1994) 22 Cal.App.4th 1841, 1852, disapproved on another ground in *People v. Martinez* (1995) 11 Cal.4th 434, 448, 452.)

Appellant's purported admission that he touched the baggies when they were in his car strongly supported the inference that he possessed the drugs. Where essentially all of the remaining evidence was circumstantial, that error removed the best evidence of the statement and eliminated any opportunity to challenge Goettsche's rendition of the statement. The damage from that ruling expanded when the court permitted the prosecutor to include the statement in the hypothetical and permitted Symonds to repeat the statement in his testimony. The prosecutor further exploited the trial court's erroneous ruling by featuring appellant's alleged statement throughout final argument to the jury. She cited the statement at least six times while arguing to the jury.[3]

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[3] Excerpts from the prosecutor's argument follow: "So . . . possession of a controlled substance, it's easy. It's methamphetamine. So how do we know that he possessed it? Well, one, the defendant admitted touching it. When the officer used a ruse, he strategized by saying, look, we're going to find your fingerprints on it. Your fingerprints are on it. We've already got them. And that's when the defendant broke down and said I touched it, I touched it. So it shows that, yes, he was in possession. He had control over it. The right to control over it, because it was his. He had control over it." While discussing circumstantial evidence relevant to possession, the prosecutor reminded the jurors of appellant's statement: "Again, the defendant admitted that he touched it." "And . . . the fact that he said he touched it when Officer Goettsche [said] we're going to find prints on the baggies, you know, everybody touches baggies when you're moving it in the

The trial court's erroneous rulings undermined the integrity of the fact-finding process by blocking the jury's access to the best evidence of what appellant actually said to Goettsche, and allowing the prosecutor, through expert testimony, to republish Goettsche's version of appellant's statement. (See *People v. Uribe* (2008) 162 Cal.App.4th 1457, 1482 [suppression of video tape that contradicted and therefore impeached government witnesses required reversal].) "Clearly, the scope for doubt and misgivings is substantial. In these circumstances, neither *People v. Watson* . . . nor *Chapman v. California* . . . can be satisfied." (*People v. Filson, supra*, 22 Cal.App.4th at pp. 1848-1849, 1852 [video tape that impeached testifying officer's perception of defendant's mental state was material].) We do not address appellant's remaining claim that the prosecution violated *Brady v. Maryland* (1963) 373 U.S. 83, by failing to timely disclose the booking video.

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

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car. And that's when the defendant said, yeah, I touched it. [¶] So within the context of that conversation, the defendant had the drugs . . . . [¶] Presence . . . the defendant knew of the presence because, one, he admitted touching it. He knew it had been in the car because it's implicit in his statement."

Jeffrey G. Bennett, Judge

Superior Court County of Ventura

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